

Decision **DRAFT DECISION OF ALJ BUSHEY** (Mailed 5/28/2002)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own
Motion to Consider Adoption of Rules
Applicable to Interexchange Carriers for the
Transfer of Customers Including
Establishing Penalties for Unauthorized
Transfer.

Rulemaking 97-08-001
(Filed August 1, 1997)

Investigation on the Commission's Own
Motion to Consider Adoption of Rules
Applicable to Interexchange Carriers for the
Transfer of Customers Including
Establishing Penalties for Unauthorized
Transfer.

Investigation 97-08-002
(Filed August 1, 1997)

OPINION MODIFYING DECISION 01-09-011

This decision modifies the award adopted in Decision 01-09-011, which awarded Greenlining Institute and Latino Issues Forum \$73,344.00 in compensation for their contribution to D.00-03-020 and D.00-11-015. Consistent with D.02-05-011, we modify the hourly rates adopted for attorneys Susan Brown and Robert Gnaizda. These changes result in a total award of compensation of \$77,475.50. The incremental award (\$4,131.50) shall be paid from the intervenor compensation program fund, as described in D.00-01-020. Interest shall accrue on the award at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release G.13, beginning March 7, 2001, the

75th day from the date the request was filed, and continuing until full payment is made. In all other respects, the petition to modify filed by Greenlining Institute and Latino Issues Forum is denied.

1. Background

In D.01-09-011 we awarded Greenlining Institute and Latino Issues Forum \$73,344.00 in compensation for their substantial contribution to D.00-03-020 and D.00-11-015. The work of the parties in this proceeding was performed in 1997 through 2000. Greenlining Institute and Latino Issues Forum were represented by attorneys Susan Brown, Robert Gnaizda, and Chris Witteman and experts John Gamboa and Jose Hernandez. Greenlining Institute and Latino Issues Forum had requested rates be set at \$275/hour for Brown, \$375/hour for Gnaizda, and \$250/hour for Witteman, for all hours of work.

To set 1997 and 1998 rates in D.01-09-011, we relied on rates previously adopted for attorneys Brown and Gnaizda. Brown's rate was set at \$240/hour and \$250/hour in 1997 and 1998 respectively. Gnaizda's rate was set at \$260/hour and \$270/hour in 1997 and 1998 respectively. Witteman first appeared before the Commission in 1998. His experience was identified in D.01-09-011 as comparable to that of attorney Paul Stein for The Utility Reform Network (TURN) and set at \$170/hour. All of the work performed by Gamboa occurred in 1998, and was compensated at a rate of \$135/hour.

To set 1999 rates for Brown and Gnaizda in D.01-09-011, the rates adopted for 1998 were utilized. Witteman's 1999 rate was set at the same rate as TURN's Stein in 1999, \$190/hour. All of the work performed by Hernandez occurred in 1999, and was compensated at a rate of \$75/hour, consistent with the rate adopted in D.00-04-011. To set 2000 rates, the 1999 rates were increased by

\$10/hour, to \$260/hour, \$280/hour, and \$200/hour for Brown, Gnaizda, and Witteman, respectively.

On November 26, 2001, Greenlining Institute and Latino Issues Forum filed a petition for modification of D.01-09-011, although it did not seek rehearing of D.01-09-011. In the petition for modification, Greenlining Institute and Latino Issues Forum asked the Commission to correct three alleged errors in D.01-09-011:

- rejecting the attorney hourly rates proposed by Greenlining Institute and Latino Issues Forum;
- failing to compensate Greenlining Institute and Latino Issues Forum for attorney Brown's time preparing the intervenor compensation request; and,
- discouraging other intervenors from appearing before the Commission by using an unnecessarily derogatory and disparaging tone.

The basis for the rates adopted in D.01-09-011 for Brown and Gnaizda were the 1998 rates from D.00-04-003, which addressed another claim for compensation by Greenlining Institute and Latino Issues Forum. Greenlining Institute and Latino Issues Forum filed a timely application for rehearing of D.00-04-003, as well as a petition to modify, which were resolved in D.02-05-011.¹ Although D.02-05-011 denied the application for rehearing, the Commission took the opportunity presented by the request to reevaluate the rates awarded to several attorneys and experts for Greenlining Institute and Latino Issues Forum,

¹ The issues that gave rise to the claim of a derogatory and disparaging tone were resolved as well in D.02-05-011.

and to modify the 1998 rates for Brown, Gnaizda, and attorney Itzel Berrio. No changes were made to the 1998 rate for Gamboa in D.02-05-011.

In D.02-05-011, we set new 1998 rates for Brown and Gnaizda at \$260/hour and \$290/hour respectively. This decision responds to the Commission's directive that we revisit the rates adopted in orders that followed D.00-04-003, in light of its modification. This decision also addresses the other issues raised in the petition for modification.

2. Procedural Matters - Purpose of Petition for Modification

The Commission's Rules of Practice and Procedure provide two means to challenge, after issuance, a Commission decision: (1) an application for rehearing, and (2) a petition requesting the modification of a decision.

Rule 86.1 cites the application for rehearing as the appropriate vehicle to alert the Commission of a legal error in the original decision.² Consistent with the concept of expeditious correction, and the requirements of Pub. Util. Code § 1731, Rule 85 requires that applicant's application for rehearing be filed within 30 days from the date upon which a decision is issued.³

The Commission utilizes the process for modifying decisions in order to address new or changed facts that might affect either the determination in a decision or its interpretation of that decision. Rule 47(a) provides for petitions for modification whereby the petitioning party requests the Commission to make

² As provided in Rule 86.1: "Applications for rehearing shall set forth specifically the grounds on which applicant considers the order or decision of the Commission to be unlawful or erroneous...."

³ As provided in Rule 85: "Application for rehearing of a Commission order or decision shall be . . . filed within 30 days after the date of issuance"

changes to the text of an issued decision,⁴ and Rule 47(b) requires a declaration or affidavit to support allegations of “new or changed facts.” Unlike Rule 85, there is no formally specified deadline indicated for a proper time frame within which to file such a petition. Rule 47(d), however, does provide that petitions submitted more than one year after the date a decision was issued must state the reason why such petitions could not have been filed within one year of the effective date of the decision.

The need to modify decisions is illustrated in the following examples.

- In D.01-10-068, mimeo. at p. 1, the Commission granted a petition for modification of a decision which addressed the water rate charged by mobile home parks. The modification was required to “delete confusing language” as well as to clarify the applicability of the decision.
- In D.01-08-055, mimeo. at p. 2, the Commission granted a petition for modification of a decision that authorized California-American Water Company to issue common stock for the purpose of financing its planned acquisition of another utility, and to pay the fee required by Pub. Util. Code § 1904(b). Subsequent to the initial decision, the company decided against the acquisition and therefore postponed paying the fee. The Commission granted the company’s request to modify the decision, thereby removing the company’s obligation to pay the said fee. The intervening decision to abandon the acquisition was found to constitute “a material change of circumstances.”

Greenlining Institute and Latino Issues Forum styled their filing as a petition for modification, but alleged no new or changed facts that might provide

⁴ Rule 47(h) provides that “[i]n response to a petition for modification, the Commission may modify the decision as requested, modify the affected portion of the decision in some other way consistent with the requested modification, set the matter for further hearings or briefing, summarily deny the petition on the ground that the Commission is not persuaded to modify the decision, or take other appropriate action.”

the basis for the petition for modification. The purpose underlying their petition for modification is to request that the Commission rectify the three alleged “errors,” already enumerated under Background and examined in detail in the following sections. Although petitioners might have filed an application for rehearing since, as stated in Rule 86.1, the purpose for such an application is to request correction of perceived and alleged errors, Greenlining Institute and Latino Issues Forum chose to style their filing as a petition for modification of D.01-09-011. The petition for modification was filed beyond the deadline for applications for rehearing.

The petition does not demonstrate any new or changed facts that might furnish an adequate foundation for the decision modification request, therefore there are grounds to simply reject the petition. Petitioners’ filing is substantively a late-filed application for rehearing, which is precluded by Pub. Util. Code § 1731. However, having determined in D.02-05-011 to review the hourly rates adopted in D.01-09-011, one of the issues raised in the petition, we address all issues raised in the petition due to the importance of the intervenor compensation program.

3. Hourly Rates

In D.02-05-011 we set a 1998 rate for Gnaizda at \$290/hour. In this claim, Greenlining Institute and Latino Issues Forum requested rate of \$375/hour for work performed in 1997 through 2000. We have previously adopted \$260/hour for 1997 and will continue to utilize that rate here. The 1998 rate adopted in D.02-05-011 should be used to award compensation for work performed in 1998. Consistent with the discussion in D.02-05-011, we look to the hourly rates adopted for Michel Florio of TURN to set a rate for Gnaizda for 1999 and 2000. In 1999, Florio was awarded \$300/hour (see D.99-11-049). In 2000, Florio was

awarded \$310/hour (see D.00-10-020). We will utilize these same rates for Gnaizda for 1999 and 2000.

In D.02-05-011 we set a 1998 rate for Brown at \$260/hour. In the claim resolved by D.01-09-011, Greenlining Institute and Latino Issues Forum requested a rate of \$275/hour for work performed in 1997 through 2000. We have previously adopted a rate of \$240/hour for 1997 and will continue to utilize that rate here. The 1998 rate adopted in D.02-05-011 should be used to award compensation for work performed in 1998. Consistent with the rate requested by Brown, we adopt \$275/hour as the rate for Brown's work in this proceeding in 1999 and 2000. This rate is at the high end of rates awarded to Brown's peer group of Commission practitioners for 1999. The \$275/hour rate for 2000 does not reflect any change from 1999 rates to account for changes in market rates for legal services between 1999 and 2000. Because it reflects her 1999 rate, we do not consider the modified 2000 rate we adopt today for Brown to limit the Commission's ability to set a different rate for 2000 in a different proceeding.

We make these changes based on our comparison of the market rates, as described in *Of Counsel*, in place over this time period and the hourly rates awarded to other intervenors, with similar backgrounds and experience, who appeared before the Commission over the same time period. Greenlining Institute and Latino Issues Forum did not make these same types of comparisons, which we find particularly useful in evaluating hourly rates, so we take this opportunity to encourage them to do so in future claims.

We make no changes to rates adopted for other attorneys or witnesses. The Commission affirmed the previously adopted 1998 hourly rate for Gamboa in D.02-05-011, and we rely on the rate here. No additional information was supplied in the petition to modify to warrant a modification to the rates of Witteman or Hernandez.

4. Disallowance of 31 Hours to Prepare Request

Greenlining Institute and Latino Issues Forum seek to modify the Commission's disallowance of 31 hours of attorney Brown's time spent preparing the request for intervenor compensation. The disallowance arose from three major flaws in Greenlining Institute and Latino Issues Forum's request. The three flaws required Commission staff to perform tasks that Greenlining Institute and Latino Issues Forum should have performed. As described in D.01-09-011, pages 11-13, these flaws were:

- 1) The request presented only one aggregated number of attorney hours to represent work for the multi-year proceeding, which is not in accordance with the Commission's practice of setting annual rates for each attorney;
- 2) The request used hourly rates which had already been rejected by the Commission;
- 3) The hours for preparing the request for compensation were neither separately tabulated nor were they charged at half the authorized hourly rate.

Greenlining Institute and Latino Issues Forum contend that the Commission's reliance on these three alleged flaws was misplaced. First, Greenlining Institute and Latino Issues Forum state that "contrary to the Decision's allegations (see D.01-09-011, p. 10), they did break down all advocate hours by day, year and activity." While that statement is accurate, we find that Greenlining Institute and Latino Issues Forum miss the point that an annual total of hours for each participating attorney is required in order to properly calculate the requested amount. As a result of this oversight, the Commission had to employ its own staff to investigate petitioners' hourly records and properly tabulate each entry to arrive at annual totals for each attorney. Because hours were aggregated, rather than broken into annual totals, the Commission staff was required to search petitioners' detailed daily billings. Because the

Commission has a long-standing practice of applying annual billing rates in its compensation determinations, Greenlining Institute and Latino Issues Forum should have presented their hours in an annual format. The annual totals are vital because we then multiply the annual totals by their respective appropriate hourly rates.

Second, Greenlining Institute and Latino Issues Forum state that the Commission improperly relied on the fact that hourly rates previously rejected by the Commission were used to justify disallowing 31 hours of compensation for preparing their request. While we understand petitioners' dissatisfaction with the hourly rates approved by the Commission in past decisions, by not identifying the previously adopted hourly rates in their claim, Greenlining Institute and Latino Issues Forum imposed on Commission staff a task which the requesting party is required to perform.

Third, Greenlining Institute and Latino Issues Forum dispute the Commission's determination that the request for compensation included time spent preparing the request that was not separately tabulated and charged at half the authorized hourly rate. Greenlining Institute and Latino Issues Forum counter that their request "specifically noted on page 22 that 'Ms. Brown has waived half of her time necessary to prepare this Request.'" (Petition to Modify at pages 9 and 10.) While this quotation is correct, a closer inspection of the detailed billing records fails to support that conclusion.

No records are presented of time spent by Brown preparing the request that are not included in the total hours. The records show Brown spent 19 hours from April 18 to May 2 and 12 hours from December 18 to 20, 2000, preparing the fee request. All of these hours are included in the request. In contrast, attorney Witteman recorded 2.3 hours on December 20, 2000, to "assist in preparation of Fee Petition" but added "No charge." The 2.3 hours are not included in these

total hours. We also note that if Greenlining Institute and Latino Issues Forum's assertion that Brown only recorded and billed for half of the time actually spent on the fee request, then the total time spent was $31 \times 2 = 62$ hours plus Witteman's 2.3 hours for a total of 64.3 hours. For comparison purposes, we note that TURN billed 16 hours of a junior attorney's time in their fee request, less than half Greenlining Institute and Latino Issues Forum's recorded and billed time, and less than one-quarter of their asserted time. As this detailed discussion demonstrates, the fee request presented by Greenlining Institute and Latino Issues Forum was inadequate, and therefore it is not reasonable to compensate Greenlining Institute and Latino Issues Forum for the time spent preparing the request.

5. Award

Utilizing the revised hourly rates for Brown and Gnaizda the total award for Greenlining Institute and Latino Issues Forum is \$77,475.50, as calculated below.

ADJUSTED AWARD BASED ON REVISED RATES

Witness	Year	Hours	Rate	
Brown	1997	11.85	\$ 240.00	\$ 2,844.00
Brown	1998	43.1	\$ 260.00	\$ 11,206.00
Brown	1999	114.3	\$ 275.00	\$ 31,432.50
Brown	2000	20.8	\$ 275.00	\$ 5,720.00
Gnaizda	1997	2.15	\$ 260.00	\$ 559.00
Gnaizda	1998	9.75	\$ 290.00	\$ 2,827.50
Gnaizda	1999	9.65	\$ 300.00	\$ 2,895.00
Gnaizda	2000	0.3	\$ 310.00	\$ 93.00
Witteman	1998	8.1	\$ 170.00	\$ 1,377.00
Witteman	1999	31.3	\$ 190.00	\$ 5,947.00
Witteman	2000	0.9	\$ 200.00	\$ 180.00
Gamboa	1998	2.2	\$ 135.00	\$ 297.00
Hernandez	1999	139.5	\$ 75.00	\$ 10,462.50
Subtotal				\$ 75,840.50
Other Costs				\$ 1,635.00
Total Award				\$ 77,475.50

Of this amount, \$73,344.00 has already been paid, resulting in an increased award of \$4,131.50. Consistent with how we allocated responsibility for the award adopted in D.01-09-011, the \$4,131.50 increment shall be paid from the intervenor compensation program fund, as described in D.00-01-020.

Consistent with previous Commission decisions, interest shall accrue on the award at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release G.13, beginning March 7, 2001, the 75th day from the date the request was filed, and continuing until full payment is made.

As in all intervenor compensation decisions, we put Greenlining Institute and Latino Issues Forum on notice that Commission staff may audit their records related to this award. Thus, they must make and retain adequate accounting and other documentation to support all claims for intervenor compensation. Their records should identify specific issues for which compensation is requested, the actual time spent by each employee, the applicable hourly rate, fees paid to consultants, and any other costs for which compensation may be claimed.

Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code Section 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure.

Findings of Fact

1. Greenlining Institute and Latino Issues Forum filed a document styled as a Petition for Modification of D.01-09-011 on November 26, 2001.
2. In substance, the petition for modification is a late-filed Application for Rehearing.
3. D.02-05-011 adopted a 1998 hourly rate for Susan Brown of \$260/hour.

4. D.02-05-011 adopted a 1998 hourly rate for Robert Gnaizda of \$290/hour.
5. Greenlining Institute and Latino Issues Forum requested 1997-2000 hourly rates for attorneys Gnaizda and Brown of \$375/hour and \$275/hour respectively.

Conclusions of Law

1. Pursuant to Rule 47(h), the Commission may deny a Petition for Modification on the ground that the Commission is not persuaded to modify the decision.
2. For the reasons stated above, the Commission is not persuaded to modify D.01-09-011, except with respect to the hourly rates of Brown and Gnaizda.
3. The 1998 rates adopted in D.02-05-011 should be utilized for 1998 rates for attorneys Gnaizda and Brown.
4. Gnaizda should be awarded \$300/hour in 1999 and \$310/hour in 2000.
5. Brown should be awarded \$275/hour in 1999 and 2000.
6. 1999 rates to account for changes in market rates for legal services, the modified 2000 rates adopted today should not limit the Commission's ability to set a different rate for 2000 in a different proceeding for attorney Brown.
7. Greenlining Institute and Latino Issues Forum jointly should be awarded an additional \$4,131.50 for their contribution to D. 00-03-020 and D.00-11-015.
8. This order should be effective today so that Greenlining Institute and Latino Issues Forum may be compensated without unnecessary delay.

O R D E R**IT IS ORDERED** that:

1. Decision (D.) 01-09-011 is modified as follows:
 - A 1998 billing rate of \$290/hour is awarded to Gnaizda;

- A 1999 billing rate of \$300/hour is awarded to Gnaizda;
- A 2000 billing rate of \$310/hour is awarded to Gnaizda;
- A 1998 billing rate of \$260/hour is awarded to Brown;
- A billing rate of \$275/hour is awarded to Brown for 1999 and 2000;
- Greenlining Institute and Latino Issues Forum are jointly awarded an additional \$4,131.50 in compensation for their substantial contribution to D.00-03-020 and D.00-11-015.

2. Payment shall include interest on the incremental award (\$4,131.50) at the rate earned on prime, three-month commercial paper, as reported in Federal Reserve Statistical Release G.13, beginning March 7, 2001, and continuing until full payment is made.

3. In all other respects the November 26, 2001 petition for modification is denied.

4. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.